First Supplement to Memorandum 2015-47

New Topics and Priorities: Additional Comments and Suggestions

The Commission[1] has received a few new communications relating to its annual consideration of new topics and priorities. The following materials are attached for the Commission's reference:

Those materials are briefly discussed below.

ADDITIONAL COMMENTS FROM FRANK COATS

Frank Coats submitted two additional email comments related to the Bond and Undertaking Law.

Mr. Coats' first follow-up email[2] provides a procedural recommendation regarding his initial new topics suggestion (attached to Memorandum 2015-47[3]).

Mr. Coats' second follow-up email[4] identifies a number of additional concerns with the Bond and Undertaking Law. Mr. Coats suggests that "[i]f the Bond and Undertaking Law is being looked at perhaps [this] additional set of problems may be addressed."[5]

The staff will keep these comments on file for future consideration in conjunction with any work undertaken on the Bond and Undertaking Law.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Exhibit p. 1.
3. See Memorandum 2015-47, Exhibit pp. 1-3.
4. Exhibit pp. 2-4.
5. *Id.* at 2.

ADDITIONAL COMMENTS FROM BEVERLY PELLEGRINI

Beverly Pellegrini sent an additional comment in response to the discussion of her initial suggestion in Memorandum 2015-47.[6] As with Ms. Pellegrini's earlier comment, her concern here seems largely focused on revocability and control of trust assets of a jointly-established trust by a surviving co-Trustor in the period following the death of a co-Trustor.[7]

In this comment, Ms. Pellegrini raises concerns about the appointment of the Public Guardian as a successor trustee following the death of a co-Trustor, while other Trustors remain alive and competent.[8] It appears that her concern is largely related to who has the authority to exercise control over trust property during this period.

Presumably, where an independent successor trustee is appointed, the surviving co-Trustor could be precluded from exercising full and complete control over all trust property. In some instances, certain trust property may be subject to distribution at the direction of the successor trustee, regardless of the surviving co-Trustor's wishes.

The staff believes this issue should be considered in conjunction with any future clarification of the law regarding the revocability and disposition of trust property during the period following the first co-Trustor's death (as discussed in Memorandum 2015-47).[9] The staff will keep this comment on file for that purpose.

Respectfully submitted,

Kristin Burford
Staff Counsel

6. Exhibit pp. 5-7.
7. See Memorandum 2015-47, pp. 27-29.
8. See Exhibit p. 5.
9. See Memorandum 2015-47, pp. 27-29.

EMAIL FROM FRANK COATS
(11/19/15)

Ms. Burford:

I will be unable to attend the meeting but hope to be able to provide some comments. In my view, it would be best to revert to the language prior to the amendment; then, address whether it is necessary to add new law in order to establish that a deposit in an action or proceedings may be given by check probably not necessary, unless it is not clear that GC 6357 applies to deposits given to a court).

EMAIL FROM FRANK COATS
(11/19/15)

Ms. Burford:

If the Bond and Undertaking Law is being looked at perhaps an additional set of problems may be addressed.

By the definition of surety, brought in by reference to CC 2787, includes the person who puts up the deposit; and, the state agency holding the deposit is also a surety with the obigations of a surety (*Walton v. Eu* (1983) 143 Cal.App.3d 403); and, to compel payment by a surety the surety must be joined in the action against the principal (CCP 996.430); and, an unjoined surety may "voluntarily" pay upon a judgment in favor of the creditor and against the principal setting forth the nature and extent of the liability and the surety otherwise pays in good faith; how does this work with CCP 995.750 - 995.760?

To be prudent, a beneficiary plaintiff should sue and obtain a judgment against: the principal; the depositor if other than the principal; and, the agency holding the deposit. If the beneficiary/plaintiff obtains a judgment against the principal alone; then, the agency should refuse to apply the deposit to the judgment if: there is a depositor other than the principal and the creditor has not obtained a judgment against the depositor or the consent of the depositor to disbursement; if the state knows of other claimants who cannot be satisfied if this creditor is paid; if the deposit was not given until after or was withdrawn prior to the event; any other facts which tend to indicate that some one with an interest in the deposit has been left out. If the agency permits a payout in bad faith, then the agency may be subject to liability even after it has exhausted the fund (it cannot reduce its liability on the basis of a payment not based on at least a judgment against the principal and otherwise made in good faith (CCP 996.480).

Under CCP 995.750- 996.760, it appears that a creditor may get a judgment against the principal, wait 30 days for payment, then return to court on a notice motions for an order applying the deposit to the judgment. What if the deposit was given by a third-party, by definition a surety? Must that person be made a party to the original suit? Can that person be first brought in at the noticed motion stage? What of the state agency stakeholder? Must the state agency be named and served in the action against the principal? Must the agency be made a party to the motion? Can the agency be first brought in at the notice motion stage? After the order following the notice motion, is the depositor, or the state agency, still in the position of a surety presented with a judgment against the principal but not against the surety? That is, does the depositor and/or agency get to ignore the order if there is an unjoined depositor or other claimants, or it appears that the creditor and the debtor cooperated in getting the judgment issued when it was not justified? (say, the deposit was given after or withdrawn before the event giving rise to the judgment).

At this point in time, it is probably malpractice for an attorney representing a beneficiary to fail to name and serve, and obtain a judgment against, the third-aprty depositor and the stakeholding state agency. However, I doubt that any state agency tells the public, or attorneys, that they must obtain a judgment against the agency in order to compel payment. This despite the fact that the earlier the agency is brought in, the earlier

the agency may determine whether or not there are other claimants and whether or not a cross-complaint in interpleader should be commenced.

I have recently dealt with a situation where the principal gave the agency an assignment of a deposit in a financial institution; and, when the agency directed the financial institution to disburse funds the financial institution admitted that it had closed the account ten years earlier without notice to the agency. This financial institution then gave a deposit to the agency to cover the risk. However, the beneficiary did not have a judgment against this depositor, so the agency could not be entirely comfortable in applying this deposit to the judgment absent the consent of the financial institution (as in CCP 996.480). Contrary to common wisdom, a beneficiary should also sue the financial institution where the deposit sits, in the original action. If not, then way down the road, we end up without a judgment binding upon the financial institution.

995.180: is it the intent that an agency may by regulation require a bond, as opposed to the more traditional view that bonds can only be required by statute? Note Westminster case holding that we still need express authorization for requiring a bond

995.320 (a)(2): is the intent to permit a single address and a single notice to both the surety and the principal?

995.380: because of the placement of this in article 3, it appears to apply only bonds in actions and proceedings. Shouldn't it apply to all statutory bonds?

at Gov. Code 11110- 11113: If attorney general review is necessary for bond forms, then shouldn't attorney general review also be required for deposit agreement forms? After all, almost all the same problems arise. In fact, in drafting a deposit agreement one would do well to start with a AG approved bond form; automatic search and replace "surety" with "depositor"; add (a) assignment language for accounts in financial institutions; (b) authority to liquidate language as per 995.710; (c) acknowledgment of receipt of notice of assignment language for execution by the financial institution in assignment situation; (d) interest to be paid to the depositor language; (e) a definite description of the property given as a deposit.

Is there any need to codify any of the holdings of Walton v. Eu? The duties of the state agency stakeholder to the principal, the depositor, to known claimants,a nd to unknown claimants. To not disburse if to so do would impair the ability to pay other claims of whom the state has notice; the duty to not accept a deposit of less value than that required by applicable law. In addition, is there not a duty to refrain from disbursing if it appears (a) the deposit was not given until after, or was withdrawn before, the event; (b) a judgment was not obtained against the principal and any third-party depositor; (c) the state has notice that the principal or depositor claims it was not properly served. The final holding of Walton, that the agency could be liable for accepting a deposit of less value than required, finds liability for an act performed when there were no claimants, let alone any known claimants. Doesn't this mean that the state could be liable for paying out on a judgment against the principal, the third party and the state, if the state should have known the cause was not well based - say the event occurred while the deposit not in effect; or, the claim was based on a car accident and the plaintiff did not have insurance, therefore could not collect for pain and suffering etc.?

In my reading of the BUL and its history, I saw no reference to the Deposit Law, CC 1813 and following, particularly 1825; although, this law very clearly applies to deposits give to serve a security.

Should the BUL contain a provision requiring the surety (including third-party depositor or state agency stakeholder) to promptly notify the principal, or the state to promptly notify the third-party depositor surety, of actions which might reduce the deposit? Should the surety or the state a stakeholder be obligated to notify a claimant of other known claims? (similar to CC 1825).

Thanks for your time.

Frank Coats

EMAIL FROM BEVERLY PELLEGRINI
(11/19/15)

Dear Kristin,

I spoke with Brian, and he suggested that due to more pressing priorities for the Law Commission and because I am well satisfied with your discussion of the "joint lifetimes" issue, it may not be the best use of my time to come to this December 10 meeting. He did suggest that I send you comments regarding the public guardian use and abuse. I hope that the following will concisely state some of the issues that we discussed this morning.

Public Guardian

The role of the public guardian can be one of conservator of the person, conservator of the estate, conservator of both the person and estate and as guardian in each of these instances. The Probate Code also permits the public guardian to be appointed as a successor trustee.

In some cases, it becomes necessary and proper for such appointment, but, today, it is leading to abuse.

Public Guardians should NEVER be appointed when a settlor is competent or when the Settlor, who retains power to revoke over the revocable trust.

This starting point conforms to Probate Code Sections 15800, 15802, 15803, 15401 (b)(2), 15410 and 16069.

This means that any Court will NEVER have any authority by law and ABSOLUTELY NO discretionary authority to appoint a public guardian on its own when the Settlor is competent. (A competent person is not required to prove competency.)

An exception can be made if the Settlor and all beneficiaries of any and all degrees (i.e., beneficiaries outside the venue, contingent remainders, beneficiaries with any type of interest, present or future, etc.) must be unanimous in agreement of proposing an appointment. In other words, this absolute and unanimous agreement of all interested parties (parties with any kind of present or future interest) must be in total agreement to absolve the court of any abuse of discretion. If one beneficiary of any degree is not notified or if any one less of full unanimous agreement is reached, the Court will not be empowered to acquiesce to the request. Also, if a future interest is change, i.e., a new beneficiary designation, this beneficiary must be immediately notified and consent must be given. If this new designated beneficiary declines approval, the public guardian will cease his/her control; a new trustee must be found; a full accounting for the entire period that the public guardian served in appointment must be made within 30 days (this is not difficult if the public guardian has kept proper records); if any voids or discrepancies are found that cannot be corrected or explained fully, the public guardian and the City or County will be fully liable for the loss plus a penalty.

The financial penalties and control must be severe enough to deter abuse. When a county has to pay and pay immediately, there will be less likelihood of abuse.

In one case, Donahue v. Watson 411 N.E. 2d 741 (1980), the Indiana Appellate Court removed a trustee who distributed proceeds of real property sales to herself as income. This case, however, is different from the situation of which I am referring. In most trust cases, beneficiaries and trustees have conflicts when the settlors of the inter vivos trusts have both died (which ties into the joint lives issue). The Court is then stuck in the difficult position of determining the intent of the dead settlors. In testamentary trusts, the

issue is the same, i.e., the settlors are dead. The four corners of the document or extrinsic evidence, as permitted, may be necessary to figure out the dead person's intent as dead people can't talk.

When the situation involves living Settlors, however, the issue of the interference of the Court becomes an interference of individual property rights. Think about the following: when a person is living, he earns capital for his labor, spends or saves it. He has absolute control. He can buy groceries or by heat in the winter. He might try to save and buy both. He may save to buy a boat or he may save for his retirement. No one controls what he does with his capital or the choices he makes for himself as long as he does not steal from another. He may even raise debt to augment his purchasing power. All these activities are his right to exercise concerning his property. When husband and wife are married and a husband dies, should not the wife have the same expectancy and right over property and savings that she contributed to the marriage? Apparently, the Cal. Legislature believes she should as they gave her extended rights in the clarification codified in 15401(b)(2) and 15410. And when that married couple hold their property titled in joint tenancy and transfer it to themselves to hold in trust (supported by the FRanchise Tax Board and Board of Equalization) should not the surviving spouse have sole and complete control without interference over this property?

The answer is yes. The current law supports it. So, when the court abuses its discretion and acts under 17200 when there is a clear exception to the law under 15800, and a clear exception to allowing the appointment of a success trustee, does the court have the power to step into the Settlor's shoes to take away her rights and priority over distribution that the California Legislature provided under 15410? The answer is no. This is an abuse of power.

Public policy concerns: If a court enables a beneficiary (who receives no income or principal while the Settlor is living from any trust over which the Settlor has distributed property to as a subturst, (making the Settlor now the trustee and sole beneficiary and falling under 16069), will this not open the floodgates for any beneficiary to attack any Trustee?

This was the case of Estate of Giraldin (CA Supreme Court case) and the case, In the Matter of Trust #T-1 Mary Faye Trimble (an Iowa Supreme Court case in which the Iowa Trust association sponsored an Amicus Curiae Brief). In both cases, while the settlor is alive, he controls the actions of his appointed trustee, i.e., the trustee owes a duty solely to the person with the power to revoke as long as this person is competent and no rights extend after death to a time when the settlor was living. This is hte concept of 15800. Therefore, any action that the Settlor takes at any time over his property that he contributes to his revocable trust or survives as settlor of a joint or multi-settlor trust, he controls the distribution of assets. And if this settlor decides to revoke a trust, fund a trust, not fund a trust, it is his decision, and his alone. The court should have ABSOLUTELY NO JURISDICTION.

If the floodgates are open, beneficiaries will be able to attack their parents at any time during their lives to demand their expected distributions long before they have vested, if ever. There have already been two cases (dismissed early on) regarding children expecting and demanding that their parents provide funds for college as an entitlement. The same will be true if cases like the situations described continue.

If a court exercises jurisdiction to support a beneficiary under the above circumstances under 17200 when there is the clear exception in the above-referenced sections, the court should be held fully responsible. Any harm caused in fees should be returned to the Settlor/TRustee/Beneficiary. Any costs incurred should be reimbursed by the Court. If the State or County must pay, the courts will think twice before committing this abuse of power and control. The beneficiary bringing the wrongful suit who is represented by an

attorney who should know better, should be found jointly and severally liable with the attorney.

When a court, in our situation, exercises jurisdiction that the court does not have by law because a credit shelter trust was not funded on the first spouse's death (it could not be funded under the asset structure of the trust), should a beneficiary have a right to bring a false claim stating that she believes that the trustee holding title with the claim and the property is held by another (also the trustee, i.e., the same person). This is the basis of many 850 claims that attorneys flock to because of the element of double damages.

Surviving Settlor can control the distribution (15410).

Surviving settlor creates revocable trust. (15410)

Surviving settlor is trustee of this revocable trust. (15800)

Surviving settlor is trustee and beneficiary during her lifetime (16069).

Surviving settlor designates co-trustee. Co -trustee has duty to settlor under 15800.

Future contingent beneficiary who received nothing before the surviving settlor controlled the distribution makes claim under 850 that the trustee has title but because it is a revocable trust she also has possession.

Does the beneficiary have standing?

Answer No. Probate Code 48 provides no standing; 17200 provides no standing. So, if court gives standing to beneficiary, court is abusing its discretion; then court abuses it again by appointing public guardian to liquidate assets of the UNFUNDED trust and claim that the public guardian is now the trustee of liquid assets intended to benefit the trustee/beneficiary.

The Court, the public guardian and all parties involved in this endeavor should be held fully and severely liable. No court trial is necessary. No appellate review is necessary. These people should pass GO and go directly to jail because of the harm that they cause to people's lives.

If the penalty is severe, the abuse will stop, and it will stop overnight.

The fact is the laws are already in place to prevent the activity. They are not being enforced by the court or by attorneys representing their clients. This is also a bar association matter and a matter of judicial performance. Nevertheless, sanctions are not the answer. The penalty must be harsh and fast and the judgment must be carried out expediently without delay. This will curtail the abuse.

If the law commission and California Bar, and Judges don't want these penalties, ask yourselves why? Perhaps the reason will be that the abusive practice is just too lucrative. Follow the money; stop the abuse.

Thank you again, Kristin, for your summary. If this issue can be addressed, I would appreciate it.

If you have any questions of areas or issues I have described that are not fully developed, please let me know, and I will be happy to elaborate.

Very truly yours,

Beverly Pellegrini